(1)

NO. 91-1605

Supreme Court, U.S.
FILED
MAR 20 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JUAN CONTRERAS,

PETITIONER

VS.

UNITED STATES OF AMERICA,

RESPONDENT

ON PETITION FOR
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GREGORY K. ZANEY
COUNSEL OF RECORD
710 WEST 14TH ST.
SUITE D
AUSTIN, TEXAS 78701
(512) 477-1870

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I. Whether the term inhabitant of the United States constitutionally requires evidence of an intent to reside or remain in the United States for some definite period of time as contrasted with a "physically present" definition when the term inhabitant is applied to describe an illegal alien found in a domestic border town separated by bridges from a foreign border town where that illegal alien has a family residence and the term inhabitant is an element of a federal criminal charge which under the V Amendment due process clause and the VI Amendment right to a jury trial requires proof beyond a reasonable doubt to convict an accused of an offense committed against an inhabitant of the United States pursuant to 18 U.S.C. § 242?

II. Whether the V Amendment right to due process of law and the VI Amendment secured

right to a jury trial requires a relational-specific jury instruction and more evidence than mere proximity to the actor in order to convict an accused of using and carrying a firearm during and in relation to a crime of violence as proscribed by 18 U.S.C. § 924(c) to prove possession is an integral part of the felony and a relationship existed between the firearm and the underlying offense?

III. Whether the V Amendment due process clause and the VI amendment right to jury trial are violated by a jury instruction on an attempt-to-kill charge which omits substantial step language to define and clarify "some act in an effort to bring about or accomplish something the law forbids" by failing to distinguish acts which are mere preparation from those acts

which strongly corroborate criminal intent, and does omission of the substantial step language rise to the level of plain error where the defendant did not object to the omission at the time of trial?

LIST OF ALL PARTIES

At the United States Court of Appeals of the Fifth Circuit, the parties were: appellant-defendant Juan Antonio Contreras and appellee-plaintiff the United States of America.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW . . .	i
LIST OF ALL PARTIES	iv
THIS TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTES INVOLVED	3
CONSTITUTIONAL PROVISIONS	7
STATEMENT OF THE CASE	9
REASON FOR ALLOWANCE OF THE WRIT . .	24
CONCLUSION	37

TABLE OF AUTHORITIES

PAGE

Cases

United States v. Arbelaez, 812 F.2d 530 (9th Cir. 1987)(per curiam). . . . 34

United States v. Anderson, 881 F.2d 1128 (D.C. Cir. 1989). 29

United States v. Breckenridge, 782 F.2d 1317, (5th Cir.), cert. denied, 479 U.S. 837 (1986) 16

United States v. Briscoe, 742 F.2d 842 (5th Cir. 1984). 21

United States v. Brown, 915 F.2d 219, 224 (6th Cir. 1990) 16, 30

United States v. Cartlidge, 808 F.2d 1064 (5th Cir. 1987) 21, 22

United States v. Coburn, 876 F.2d 372, rehearing denied, (5th Cir. 1989) 17, 29

United States v. Collins, 779 F.2d 1520 (11th Cir. 1986). 34

United States v. Conway, 507 F.2d 1047 (5th Cir. 1975) 23

United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988). 30

United States v. Hernandez, 891 F.2d 521, (5th Cir. 1989) 18

PAGE

United States v. Joyce, 693 F.2d 838 (8th Cir. 1982). 34

United States v. LaGuardia, 774 F.2d 317, (8th Cir. 1985) 17, 30

United States v. Manley, 632 F.2d 978 (2d Cir. 1980), cert. denied, 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed2d 841 (1981). 34

United States v. Maravilla, 907 F.2d 216 (1st Cir. 1990) 12, 13, 15, 25, 26, 27

United States v. Matra, 841 F.2d 837 (8th Cir. 1988). 30

United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979) 34

United States v. Morrow, 923 F.2d 427 (6th Cir. 1991), rehearing denied 932 F.2d 1146 (1991). 29 30, 31

United States v. Otherson, 637 F.2d 1276 (9th Cir. 1980), cert. denied, 454 U.S. 840 (1981) 13, 14, 25, 26, 27

United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976). 22

United States v. Rivera-Sola, 713 F.2d 866 (1st Cir. 1983) 34, 35

PAGE

United States v. Robinson, 857 F.2d 1006, (5th Cir. 1988). 16, 29, 30

United States v. Rovetuso, 768 F.2d 809 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986) 21

United States v. Stewart, 779 F.2d 538, (9th Cir. 1985), cert. denied, 484 U.S. 869 (1987) 17, 18

United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989). 29

United States v. Williams, 704 F.2d 315 (6th Cir. 1983), cert. denied 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed2d 679 (1983) 34

United States v. Wilson, 884 F.2d 174 (5th Cir. 1989). 18, 29, 30

United States v. Woolery, 735 F.2d 818 (5th Cir. 1984). 22

Wiborg v. United States, 163 U.S. 632, 16 S.Ct. 1127, 41 L.Ed. 289 (1896) 20

PAGE

Constitution

United States

Fifth Amendment 7, 28, 33, 35

Sixth Amendment 7, 28 35

Statutes

18 U.S.C. § 242 . . . . . 3, 9, 12, 14, 24, 25, 27, 28

18 U.S.C. § 924(c)(1) 3, 4, 9, 10, 15, 28

18 U.S.C. § 371 . . . . . 3, 5, 9, 10

18 U.S.C. § 1512(a)(1)(C) 3, 5, 9, 10, 19

TO THE HONORABLE SUPREME COURT:

Juan Antonio Contreras, petitioner, filed this petition for certiorari.

OPINION BELOW

United States v. Juan Antonio Contreras, 950 F.2d 232, (5th Cir. 1991) (CA5 No. 91-2021, 12/23/91) (Table) is the opinion of which review is sought in this Court. That opinion is reproduced in the Appendix to this petition. See A3-A51.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Fifth Circuit Court of Appeals sought to be reviewed were dated and entered December 23, 1991. Under 28 U.S.C. § 1291, that Court of Appeals had jurisdiction over this case. Petitioner did not file a suggestion for rehearing en banc. The statutory provision believed to confer jurisdiction on this Supreme Court to review this case is 28 U.S.C. § 1254. Within the 89 day

period following December 23, 1991, this petition was timely mailed for filing by the Clerk of this Supreme Court.

STATUTES INVOLVED

Petitioner was convicted of two violations of 18 U.S.C. § 242 (deprivation of civil rights under color of law), two violations of 18 U.S.C. § 924(c)(1) (using a firearm during the commission of a crime of violence), one violation of 18 U.S.C. § 371 (conspiracy to tamper with a victim and witness), and one violation of 18 U.S.C. § 1512(a)(1)(C) (tampering with a victim and witness by attempting to kill her).

18 U.S.C. § 242

Deprivation of rights under color of law reads:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury

results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 924(c)(1)

Penalties, reads:

(c)(1) Whoever during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of

this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

18 U.S.C. § 371

Conspiracy to commit offense or to defraud United States, reads:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1512

Tampering with a witness, victim, or an informant, reads:

(a)(1) Whoever kills or attempts to kill another person, with intent to--

(A) prevent the attendance or testimony of any person in an official proceeding;

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (2).

CONSTITUTIONAL PROVISIONS

This case concerns the constitutionally secured right to due process of law under Amendment V, and the constitutionally secured right to a jury trial under Amendment VI.

Amendment V (1791) reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI (1791) reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of their State and District wherein the crime shall have been committed, which District shall have been committed, which District shall have been previously ascertained by a law, and to be informed of the

nature and cause of the accusation; to be confronted by the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is a criminal case in which the district court had jurisdiction pursuant to 18 U.S.C. § 3231. On May 31, 1990, Petitioner Juan Antonio Contreras was charged in a six-count indictment, alleging violations of 18 U.S.C. § 242, 18 U.S.C. § 924(c)(1), 18 U.S.C. § 371 and 18 U.S.C. § 1512(a)(1)(C).

Counts One and Two charged Petitioner, while acting under color of law, denied Patricia Orozco, an inhabitant of Texas, her civil rights by unlawfully detaining and sexually abusing her, in violation of 18 U.S.C. § 242.

Count Three charged Petitioner with using a firearm during and in relation to his denying Patricia Orozco her civil rights as charged in Count Two, in violation of 18 U.S.C. § 924(c)(1).

Count Four charged Petitioner with conspiracy to tamper with Patricia Orozco,

a victim and witness by attempting to kill her, in violation of 18 U.S.C. § 371.

Count Five charged Petitioner with tampering with Patricia Orozco, a victim and witness, by attempting to kill her, in violation of 18 U.S.C. § 1512(a)(1)(C).

Count Six charged Petitioner with using a firearm during and in relation to his tampering with Patricia Orozco by attempting to kill her as charged in Count Five, a violation of 18 U.S.C. § 924(c)(1).

A jury trial commenced on September 19, 1990, and a verdict of guilty on all six counts was returned by petit jury on September 27, 1990.

The trial court sentenced Petitioner on December 17, 1990 to one (1) year confinement on Count One, ten (10) years confinement on Count Two, five (5) years confinement on Count Three, five (5) years confinement on Count Four, twenty (20) years confinement on Count Five, and twenty

(20) years confinement on Count Six, with the sentences to run consecutively to each other. Petitioner was additionally sentenced to three (3) years supervised release on Counts Two through Six, and one (1) year supervised release on Count One and fined $25,000.00.

It is from those convictions, sentences and the affirmance of the United States Court of Appeals for the Fifth Circuit that Petitioner now seeks a Writ of Certiorari.

The Fifth Circuit Panel composed of Judges Goldberg, Smith and Duhe, affirmed the Petitioner's convictions on all six counts. The opinion of the Fifth Circuit is reproduced in the Appendix at A3-A51, and sets forth in detail the lengthy and complex summary of the facts.

I. **INHABITANT UNDER 18 U.S.C § 242.**

The issue of what evidences an inhabitant of the United States in counts

one and two for violations of 18 U.S.C. § 242 (deprivation of civil rights) was briefed and argued on appeal by counsel on both sides of the bar. Petitioner moved for a judgment of acquittal at trial on all six counts for insufficient evidence. At the Fifth Circuit, Petitioner argued, inter alia, that the Government had not met its burden on the evidence of intent to remain or reside in the United States to prove an inhabitant status beyond a reasonable doubt per the district court's instructions to the jury. Petitioner relied on the First Circuit Court's holding in United States v. Maravilla, 907 F.2d 216 (1st Cir. 1990) which held that where the evidence clearly established an intent to remain in the United States only a few hours, a foreign citizen was not an inhabitant for purposes of 18 U.S.C. § 242, but a temporary visitor. The government argued that the evidence established

residence at either a "hotel in Laredo" (U.S. Brief at p.3) or at the "Pan American Apartments" (U.S. Supplemental Brief at p.3) citing the same pages of the trial transcript both times (Tr. 288-290). The Fifth Circuit opinion footnoted testimony offered by one witness that the residence was actually a motel. See footnote 15, A45, United States v. Contreras 950 F.2d at 243. The government argued to the Fifth Circuit that the Maravilla opinion is inapposite because it applied only to a foreign person who intended to remain only a few hours in the United States unlike the instant case where according to the government, the evidence established the victim lived in the United States. In rebuttal to Petitioner's claim of statutory ambiguity and lack of legislative history to support a finding of inhabitant, the government further offered the holding of United States v. Otherson, 637 F.2d 1276 (9th Cir.

1980), cert. denied, 454 U.S. 840 (1981) which held that "...inhabitant as used in section 242 does include all persons without exception, present within the jurisdiction of the United States. Otherson, supra, at p. 1285. The district court in its instructions charged the jury that if "...Orozco was present within the State of Texas at the time of the offenses, then under the law she was an inhabitant." See A54.

The Fifth Circuit found the evidence sufficient for the jury to conclude that for purposes of 18 U.S.C. § 242, the victim was an inhabitant of the United States, recounting the testimony at trial of the victim, her companion, a police officer who picked up the victim at the apartment the day after the incident which formed the basis of the offense under 18 U.S.C. § 242, and of another officer who testified he went to the apartment to confirm the victim

lived there. The Fifth Circuit acknowledged the Maravilla opinion briefly but in its holding chose instead:

"...not to establish a precise definition of 'inhabitant' for purposes of the statute; rather, we hold that ... presence in the United States was sufficiently permanent...to qualify as an inhabitant under the statute.

II. **18 U.S.C. § 924(c)**

Count Three charged Petitioner with using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. § 924 (c)(1). The trial court charged the jury that:

[t]he gun charge in Count Three is about the defendant's alleged sexual abuse of Orozco charged in count two. For the defendant to be found guilty of this offense ... the government must prove two things beyond a reasonable doubt:

A. The defendant used or carried a firearm; and

B. He used or carried the firearm in relation to crime of violence prosecutable in federal court. See A63.

At the close of the evidence Petitioner made a motion for judgment of acquittal for

insufficient evidence which was denied. Petitioner argued the insufficiency of evidence at the Fifth Circuit relying on the theory that the handgun was not an integral part of the crime of sexual assault. Petitioner cited United States v. Robinson, 857 F.2d 1006, 1010 (5th Cir. 1988) and United States v. Breckenridge, 782 F.2d 1317, 1322-1323 (5th Cir.), cert. denied, 479 U.S. 837 (1986). Petitioner maintained that because he was on duty in full uniform, he was obligated to carry a firearm and that prior to the alleged sexual assault (Petitioner testified the sexual intercourse was consensual, Tr. 633-634), he had removed his gunbelt and placed it on the roof of his vehicle. (Tr. 299-300, 316). Petitioner argued that mere possession of a firearm does not establish a relationship between the weapon and the primary offense, citing

United States v. Brown, 915 F.2d 219, 224 (6th Cir. 1990).

The Government argued that the purpose of section 924(c) is to impose severe sanctions in instances where the firearm facilitates or has the potential to facilitate the commission of serious crimes, citing United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989); United States v. LaGuardia, 774 F.2d 317, 321 (8th Cir. 1985). Also cited by the government was a bit of legislative history:

> The Committee has concluded that persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment as a person whose possession of the gun violates a State or local ordinance. (S. Rep. No. 225, 98th Con. & Admin. News, 3182, 2492 n.10).

The government cited United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985), cert. denied, 484 U.S. 869 (1987) and Coburn, supra, at 375 to explain the

amendment of § 924(c) adding "during and in relation to" ensures some relation or connection between the primary criminal act and use or possession of the firearm, and that where the weapon was present but played no part in the crime, application of § 924(c) was precluded. United States v. Hernandez, 891 F.2d 521, 524 (5th Cir. 1989); United States v. Wilson, 884 F.2d 174, 176-177 (5th Cir. 1989). The government also cited United States v. Stewart, supra, to explain how the firearm facilitated or had a role in the crime, such as emboldening an actor who might have displayed or discharged the weapon for protection or to intimidate others, regardless whether such display or discharge actually occurred. 779 F.2d at 540. The government argued that Petitioner used his service revolver to intimidate and force the victim to have sex with him on the basis of the victim's testimony that

immediately prior to the assault, Petitioner placed his firearm on the roof of the car where he could reach it (Tr. 199-300, 316). The government contended that the firearm was within reach of Petitioner the entire time during the sexual assault (Tr. 300) and therefore urged that the evidence demonstrated Petitioner used his weapon to facilitate the sexual assault.

The Fifth Circuit adopted the substantial portion of the government's argument verbatim and concluded:

> The evidence is sufficient to show that this was not a case of mere inadvertence. The jury reasonably could have concluded that Contreras was emboldened by his possession of a firearm to assault Orozco, that he displayed the gun in order to intimidate her, and that he had the opportunity and ability to discharge the gun during the entire incident. A38-A39.

III. 18 U.S.C. § 1512(a)(1)(C)

Count Five charged the Petitioner with attempting to kill a potential federal witness under 18 U.S.C. § 1512(a)(1)(C).

The court's instructions to the jury are reproduced in their entirety in the appendix, see A52-71. The court's instructions omitted any reference to mere preparation or substantial step from its jury charge. In addition, the instruction in count five numbered 20.C. and 25. by the court refer to "[t]he unlawful detention and sexual assault of Orozco by the defendant..." as opposed to "...the alleged assault and sexual abuse..." instruction in count three. See A67, A69, A62.

Petitioner did not object to the charge at the time of trial but argued the substantial step vs. mere preparation issues on appeal under the plain error doctrine. Petitioner cited Wiborg v. United States, 163 U.S. 632, 16 S.Ct. 1127, 41 L.Ed. 289 (1896) and Fed. R. Crim. P. Rule 52(b) in support of the plain error doctrine. Petitioner maintained that the district court erred by not amplifying the

instruction to include the substantial step language of the holding in United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975) to define and clarify the court's instruction:

> To attempt an offense means to willfully do some act in an effort to bring about or accomplish something the law forbids. (Tr. 769) See A67-68. (emphasis added)

The government reviewed the two-prong test adopted by the Fifth Circuit in United States v. Mandujano, supra, and cited several later cases which either cited or quoted the Mandujano decision including United States v. Cartlidge, 808 F.2d 1064 (5th Cir. 1987), United States v. Briscoe, 742 F.2d 842 (5th Cir. 1984), United States v. Rovetuso, 768 F.2d 809 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986). The second prong of the Mandujano test to prove attempt requires that the defendant "must have engaged in conduct which constitutes a substantial step toward commission of the

crime." 499 F.2d at 376. The government also relied on United States v. Woolery, 735 F.2d 818 (5th Cir. 1984), quoting United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976) to advance the "objectivist" approach to acts done without regard to mens rea which mark the conduct as criminal in nature. Petitioner countered that the federal cases have adopted a "subjectivist" view, relying on the 5th Circuit holding in United States v. Cartlidge, supra, at p. 1067 which requires that some act beyond preparation be done to verify the actor's commitment to his plan. In the Cartlidge opinion, the Fifth Circuit had quoted its earlier holding in Mandujano which set out the two-prong test to constitute a criminal attempt, 808 F.2d at 1067, with the substantial step language prominent to the second prong. Petitioner maintained that the law of the 5th Circuit required an instruction including the substantial step

language, relying principally on the Mandujano test and later opinions which adopted that test.

The government urged that the instruction was adequate, citing United States v. Conway, 507 F.2d 1047 (5th Cir. 1975) for the Fifth Circuit's approval of an identical instruction on attempt. Additionally, the government contended that the substantial step language was not required and was not reversible error since defendant's conduct went far beyond mere preparation.

The Fifth Circuit agreed that most circuits including the 5th circuit have adopted a "subjectivist" approach to attempt. See A20. The Panel also reiterated its two-prong test from the Mandujano opinion but agreed with the government that there was ample evidence to satisfy both prongs of that test including the substantial step requirement, and

therefore affirmed the conviction. See A15-A18.

REASONS FOR ALLOWANCE OF THE WRIT

Violation of Right to Due Process and Jury Trial

I. INHABITANT - 18 U.S.C. § 242

This Supreme Court should exercise its discretion in allowing issuance of a Writ of Certiorari in this case because the Fifth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Federal Courts of Appeal on the same matter. This is an important issue which needs to be resolved by the Supreme Court deciding Petitioner's question on the inhabitant issue under 18 U.S.C. § 242.

Petitioner submits his judgments of conviction on counts one and two should be reversed because the government did not afford him the V and VI amendment guarantees of due process of law and a jury

trial in proving the element of inhabitant beyond a reasonable doubt. The district court's instructions to the jury relied on the "physically present" definition to prove victim was an inhabitant for purposes of 18 U.S.C. § 242. This definition of the term inhabitant is identical to the holding in Otherson v. United States, 637 F.2d at p. 1285 which "...include[s] all persons, without exception, present within ... the United States." In Otherson, there was no evidence of the victims' identities, origins, destinations, or their reasons for being present in the United States. 637 F.2d at p. 1278, yet the Ninth Circuit still held the inhabitant status had been proved, relying on the "physically present" definition. That case involved some border patrol agents who beat up some illegal aliens they picked up near the border. The Otherson court did not focus on intent as

stressed by the First Circuit in Maravilla.

Rather, in Otherson the court explained:

"Examination of other judicial explications of 'inhabitant' reveals a host of disagreements...." 637 F.2d at p. 1279-1280,

and then reasoned that:

"...equation of 'inhabitant' with 'domiciliary' would necessitate, in each case, complex and detailed factual inquiries to determine precise intent with which the aliens were present in this country." at p. 1283.

Petitioner submits that such an inquiry is not complex nor detailed. Individuals of States routinely recite a general statement of domicile to invoke state jurisdiction. Precise intent is not the benchmark of a domiciliary who avails himself of judicial redress. A few simple questions such as those a customs officer typically asks an ordinary traveler would suffice.

The plain meaning of the First Circuit holding in Maravilla is that a clear indication of the foreigner's intent to depart after only a few hours stay in the

United States mandated a finding that such a temporary visitor was not an inhabitant for purposes of 18 U.S.C. § 242. United States v. Maravilla, 907 F.2d at p. 218. The First Circuit conducted extensive research on the term inhabitant, and took pains to distinguish its holding from the Ninth Circuit in Otherson. Maravilla, supra, at pp. 224--228. The Maravilla court noted that:

"...we can understand how one might 'presume' that an alien victim found in the United States intended to stay for some time." 907 F.2d at 227 (emphasis added). See also footnote 17 in the instant case, A48.

It is this presumption which belies the inhabitant element of 18 U.S.C. § 242 and shifts the focus to intent to reside or remain in the United States in the case of an illegal alien, rather than the "physical presence" definition applied by the Ninth Circuit in Otherson. Petitioner submits that without clear evidence of intent to

reside or remain in the United States, the inhabitant element of 18 U.S.C. § 242 cannot be proved beyond a reasonable doubt and therefore violates his V and VI Amendment due process rights to a fair jury trial.

This issue needs further clarification from the Supreme Court, especially in the context of neighboring border towns where inhabitants of two different countries are separated only by a political boundary and by bridges which daily are filled with the traffic of people from both countries traveling back and forth, as well as those who take water or overland routes to enter the country illegally. Who is an inhabitant of the United States under 18 U.S.C. § 242?

II. 18 U.S.C. § 924(c)

This Supreme Court should exercise its discretion in allowing issuance of a Writ of Certiorari in this case because the

various circuit courts have rendered conflicting opinions on the meaning of the language "during and in relation to" in § 924(c). The circuit courts have developed a "fortress theory" where numerous firearms were readily available in strategic locations near large quantities of drugs or money. United States v. Wilson, supra, at 174, 177 (5th Cir. 1989) quoting United States v. Robinson, 857 F.2d 1006, 1010 (5th Cir. 1988). Virtually every case published which addresses this issue involves narcotics possession or trafficking. See, e.g., United States v. Morrow, 923 F.2d 427 (6th Cir. 1991), rehearing denied 932 F.2d 1146 (1991); United States v. Wilson, 884 F.2d 174 (5th Cir. 1989); United States v. Anderson, 881 F.2d 1128 (D.C. Cir. 1989); United States v. Coburn, 876 F.2d 372 (5th Cir) rehearing denied, 885 F.2d 870 (1989); United States v. Theodoropoulos, 866 F.2d 587 (3d Cir.

1989); United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988); United States v. Robinson, 857 F.2d 1006 (5th Cir. 1988); United States v. Matra, 841 F.2d 837 (8th Cir. 1988); United States v. LaGuardia, 774 F.2d 317 (8th Cir. 1985). The Sixth Circuit recently wrote in United States v. Morrow, supra, at 433-434 that language which simply tracks that of § 924(c) is inadequate because

> the instruction given by the district court ... failed to explain that 'in relation to' modifies 'during' and requires proof of a relationship between the firearm and drug offense. Id, at 433, quoting United States v. Brown, 915 F.2d at 224.

The Sixth Circuit criticized the jury instructions and quoted Brown, supra, at 224 to emphasize that mere possession of a weapon is not enough,

> 'Rather, under the current version of § 924(c), the government is shouldered with burden of establishing some relationship between the firearm [the defendant] possessed and the predicate drug trafficking offense.' quoting United States v. Wilson, supra, at 174, 177.

The Sixth Circuit reversed the 924(c) conviction, finding harmful error in the district court jury instruction because of the lower court's failure to instruct "more specifically on the relational element..." Morrow, supra, at 435.

None of these cases are on point with the facts in the instant case, however, because all the primary offenses involved narcotics and none of the defendants were law enforcement officers.

Petitioner submits that an important difference in the facts in his case is that he was a licensed peace officer who was required to carry a weapon in the discharge of his duties. Can a police officer be "emboldened" to commit a crime by a weapon he is required to carry on a daily basis--becoming as natural to him as if it were an appendage? The government contends that the relationship between the weapon and the alleged sexual assault was established and

the Fifth Circuit agreed that the weapon was within his reach on the top of the vehicle during the alleged sexual assault, in the back seat of the vehicle. However, it is somewhat difficult to imagine a position from which the gun could be retrieved after he dropped his pants, and commenced the sexual act. (Tr. 301) The undisputed testimony established that he took the gun belt off and placed it on top of the vehicle. (Tr. 299-300, 316, 635, 688-689) Petitioner submits that not only is it unusual for a police officer to remove his weapon while on duty, but to then place it on the roof of the vehicle which he occupies is manifestation of an intent not only to separate himself from the weapon while he pursued sexual pleasures, but to separate the weapon from the sexual activity as well. Additionally, the victim testified that Petitioner never threatened her and never took the gun out

of its holster. (Tr. 316) Petitioner submits that the government failed to carry its burden to prove the requisite relationship between the weapon and the alleged sexual assault beyond a reasonable doubt, and the evidence of mere proximity does not establish that the weapon was an integral part of the felony. Additionally, Petitioner asserts that the trial court's instruction was inadequate to protect his constitutionally secured right to due process under the V Amendment.

III. **SUBSTANTIAL STEP - § 1512(a)(1)(C)**

This Supreme Court should exercise its discretion in allowing issuance of a Writ of Certiorari in this case because the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's supervision.

Petitioner submits that nearly every circuit has adopted the jury instructions

for the offense of criminal attempt from section 5.01 of the American Law Institute's Model Penal Code. See e.g., United States v. Rivera-Sola, 713 F.2d 866 (1st Cir. 1983); United States v. Manley, 632 F.2d 978 (2d Cir. 1980), cert. denied, 449 U.S. 1112; United States v. Mandujano, 499 F.2d 370, (5th Cir. 1974), cert. denied, 419 U.S. 1114; United States v. Williams, 704 F.2d 315 (6th Cir. 1983), cert. denied 464 U.S. 991; United States v. Joyce, 693 F.2d 838 (8th Cir. 1982); United States v. Arbelaez, 812 F.2d 530 (9th Cir. 1987)(per curiam); United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979); United States v. Collins, 779 F.2d 1520 (11th Cir. 1986). Nearly all the cases recount the substantial step versus mere preparation language to prove criminal attempt and many speak to the difficulty of drawing a hard-line rule to define substantial step, preferring instead to

rely on the facts of each case and the jury's intuition. United States v. Rivera-Sola, 713 F.2d 866, 870 (1st Cir. 1983),

Petitioner submits to this Court that although a bright-line rule for defining substantial step versus mere preparation may be nearly impossible to formulate, the instructions to the jury ought, at the very least, include a reference to these terms on a charge of attempt. Each of the circuits have struggled with the problem of defining one or the other, none have drawn a bright line rule; however, nearly all have adopted the Model Penal Code instructions regarding the offense of attempt, replete with the terminology at issue here.

Petitioner submits additionally that the district court's instructions on count five not only violated his V and VI Amendment guarantees to due process and a jury trial for failure to charge the jury

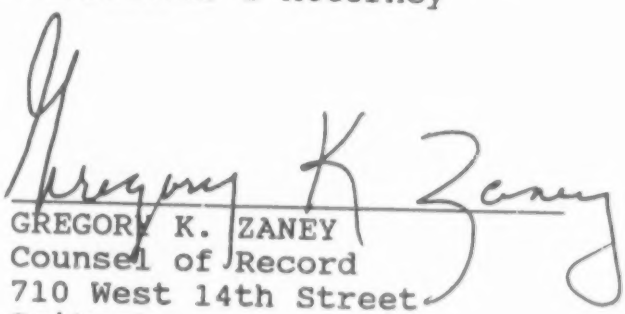
on the substantial step versus mere preparation language of attempt, the district court erroneously and harmfully instructed the jury that Petitioner unlawfully detained and sexually assaulted Patricia Orozco acting under color of law. The jury could not but convict the Petitioner by these instructions. Petitioner raises this egregious harm under the plain error doctrine.

CONCLUSION

For the foregoing compelling reasons, this Court should grant this petition for writ of certiorari.

DATED: March 20, 1992

Respectfully submitted by
Petitioner's Attorney



GREGORY K. ZANEY
Counsel of Record
710 West 14th Street
Suite D
Austin, Texas 78701
(512) 477-1870